80-1782

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IN THE

SUPREME COURT OF THE UNITED STATES

NO. _____

OCTOBER TERM, 1981

JAMES H. HERZOG,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

Whether the decision of the Eighth Circuit Court of Appeals is consistent with the requirements of Rule 11, Federal Rules of Criminal Procedure, McCarthy v. United States, 394 U.S. 459 (1969), and the decisions of other circuit courts, when on the record presented to the trial court, there was no factual basis to support the entry of Petitioner's guilty plea.

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

The Petitioner, James H. Herzog, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is not yet reported. The slip opinion is found in the Appendix. The District

Court filed a non-published opinion, which is also found in the Appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on March 20, 1981. This Petition is filed within thirty days of the Court's judgment. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254. The District Court's jurisdiction was invoked by Motion to Withdraw Guilty Plea pursuant to Rule 32(d), Federal Rules of Criminal Procedure, and by Motion to Vacate Sentence, pursuant to 28 U.S.C. §2255.

QUESTION PRESENTED

Whether the decision of the Eighth Circuit Court of Appeals is consistent with the requirements of Rule 11 Federal Rules of Criminal Procedure, McCarthy v. United States, 394 U.S. 459 (1969),

and the decisions of other circuit courts, when on the record presented to the trial court, there was no factual basis to support the entry of Petitioner's guilty plea.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment VIX

Section I. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny any person within its jurisdiction be equal prctection of the laws.

STATUTORY PROVISIONS

18 U.S.C. §153:

Whoever knowingly and fraudulently misappropriates to his own use, embezzles, spends or transfers any property or secrets or destroys any document belonging to the state of a debtor which came into his charge as a trustee, custodian, marshal, or other officer of the Court, shall be fined not more than the $5,000 or imprisoned not more than five

years or both.

18 U.S.C. §154:

Whoever, being a custodian, trustee, marshal, or other officer of the Court, knowingly purchases, directly or indirectly, or property of the estate of which he is such officer in a case under Title 11; ...

Shall be fined not more than $500.00 and shall forfeit his office, which shall thereupon become vacant.

Rule 11, Federal Rules of Criminal Procedure:

(a) Alternatives. A defendant may plead not guilty, guilty, or nolo contendere. If a defendant refuses to plead or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.

(b) Nolo contendere. A defendant may plead nolo contendere only with the consent of the court. Such a plea shall be accepted by the court only after due consideration of the views of the parties and the interest of the public in the effective administration of justice.

(f) Determining accuracy of plea. Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.

STATEMENT

Petitioner was charged by indictment with 14 violations of 18 U.S.C. §153, Embezzlement by Trustee or Officer, in connection with his trusteeship of the bankruptcy of the ENDECO Company and certain related entities.

On March 12, 1979, the day set for trial, the Government admitted that the allegation of counts 7 through 14 were defective and moved to dismiss them; the motion was granted.

Petitioner plead guilty to counts two, three and five and nolo contendere to count one of the indictment. Petitioner also plead guilty to an information, filed on the date of trial, which prohibits self-dealing by a trustee with the estate he supervises. The pleas were entered on agreement of counsel as a result of

negotiations the night before trial. The remaining counts in the indictment, four and six, were dismissed.

Since the basis of this Writ of Certiorari is the lower court's failure to comply with Rule 11, the facts surrounding the entry of the guilty pleas and the indictment itself are described in greater detail. Counts one, two, three and five of the indictment allege that Petitioner appropriated over $300,000 from the bankrupt estate for his own use. The individual counts on the indictment are not specific as to the actual source of the alleged embezzlement. The counts do allege when the appropriations took place, however.

At the plea hearing, the United States introduced testimony from three federal agents who described the evidence

which would have been submitted to support the allegations in the indictment. Their testimony described a series of financial transactions, tracing the alleged embezzlement through an examination of the books and records of the bankrupt estate.

When Petitioner entered his plea, he was asked a series of questions regarding the voluntariness of the plea and his understanding of the charges against him. Petitioner answered the Court's inquiries in the affirmative. Petitioner was specifically asked if he understood he was forbidden to deal with himself, as alleged in the information, and in violation of 18 U.S.C. §154. Petitioner responded, "in retrospect, yes Sir."

At sentencing, Petitioner was allowed to submit a detailed refutation of each allegation in the indictment.

A year after the Court imposed sentence upon Petitioner, he filed a motion, made pursuant to Rule 32, Federal Rules of Criminal Procedure to withdraw his guilty pleas, or in the alternative, to vacate the sentence imposed, pursuant to 28 U.S.C. §2255. The District Court denied the motion and requested relief. The Eighth Circuit affirmed; and a copy of its opinion appears in the Appendix.

REASON FOR GRANTING THE WRIT

The mechanical application of Rule 11 by the District Court, upheld by the Eighth Circuit Court of Appeals, is contrary to the purpose of Rule 11, and is inconsistent with the mandate of McCarthy v. United States, 394 U.S. 459 (1969) and the decisions of other circuit courts.

This Court has recognized the importance of plea bargaining in the administration of justice.

> Whatever might be the situation in an ideal world, the fact is that the guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system. Properly administered, they can benefit all concerned.

Blackledge v. Ellison, 431 U.S. 63, 71, (1977); quoted in Bordenkircher v. Hayes, 434 U.S. 357, 361 (1978).

The entry of a plea is governed by Rule 11, Federal Rules of Criminal Procedure. Rule 11 requires, in part, that "[n]otwithstanding the acceptance of a plea of guilty, the Court should not enter a judgment upon such plea without making such inquiry and shall satisfy it that there is a factual basis for the plea."

This Court undertook in McCarthy v. United States, 394 U.S. 459 (1969) to examine and explicate the requirement of Rule 11, and that decision therefore is the benchmark from which the analysis of this case must begin. The purpose of adhering to the requirements of Rule 11 were discussed in detail in the McCarthy. This Court concluded:

> There is no adequate substitution for demonstrating in the record at the time the plea is entered the defendant's understanding of the nature of the charge against him. 394 U.S. at 470 (Emphasis in original)

This Court noted that:

> Because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts. 394 U.S. at 466.

The requirement of a clear showing of this understanding is to "protect a

defendant who is in a position of pleading voluntarily with an understanding of the nature of the charges but without realizing that his conduct does not actually fall within the charge." 394 U.S. at 467.

The Defendant's remedy for a defective guilty plea is clearly stated by the Court:

> [W]e hold that a defendant is entitled to plead anew if a United States District Court accepts his guilty plea without fully adhering to the procedure provided in Rule 11. 394 U.S. at 463-464.

McCarthy's conviction on one count of tax evasion was reversed specifically because, on the record, McCarthy did not understand the element of specific intent as an essential part of the charge against him. The broader holding in McCarthy is, however, that "prejudice inheres in a failure to comply with Rule 11." 394 U.S. at 471.

The mandate of McCarthy was clear and unequivocal. As a result, the circuit courts now require full compliance with Rule 11 for a guilty plea to survive appellate review. See e.g. United States v. Carter, 619 F.2d 293 (3rd Cir. 1980); Moore v. United States, 592 F.2d 753 (4th Cir. 1979).

The Eighth Circuit Court of Appeals found no violation of Rule 11 in this case. Noting that documentary information had been introduced regarding the alleged crime, coupled with the Petitioner's age, experience and education, the Eighth Circuit Court of Appeals found a sufficient factual basis upon which the trial court could accept the pleas.

The Eighth Circuit's finding of compliance with Rule 11 is not supported by the record; and further, the Eighth

Circuit's decision here is in conflict with the holdings of other Circuit Courts of Appeal rendered under similar circumstances to this case.

The Circuit Court of Appeals have reversed convictions resulting from guilty pleas where, as here, there is (1) a clear lack of factual basis for the plea; (2) a question as to the defendant's understanding that his conduct falls within the definitions of the charges against him; and (3) where the specific guidelines of Rule 11, Federal Rules of Criminal Procedure have not been followed.

In United States v. Wetterlin, 538 F.2d 346 (7th Cir. 1978), cert. denied, 439 U.S. 1127 (1979), the circuit decision most directly on point, the defendant's conviction, resulting from a guilty plea to one count of an indictment, was reversed

because the trial court failed to comply with the requirements of Rule 11. The trial court did not adequately explain the charge of conspiracy to the defendant; and, there was no adequate factual basis presented on the record to support the plea. The facts relating to the conspiracy charge were extraordinarily complex. 583 F.2d at 350. The Seventh Circuit found the lower court had ignored the mandate of this court in Santobello v. New York, 404 U.S. 257, 261 (1971) that "the judge [shall] develope on the record the factual basis for the plea." (emphasis in original) 583 F.2d at 352.

Similarly, in Burton v. United States, 483 F.2d 1182 (9th Cir. 1973), the defendant's convictions resulting from guilty pleas were reversed, where, on the record, there was no factual basis for the plea.

The fact that the defendant admitted he was guilty was not an adequate factual basis to comport with the requirements of Rule 11. 483 F.2d at 1185. The Defendant's "repeated protestations of innocence" 483 F.2d at 1186, during and after the plea, was a major reason for the Ninth Circuit's decision.

And, in United States v. Cody, 438 F.2d 287 (8th Cir. 1971), the defendant's convictions by a guilty plea were reversed where the Eighth Circuit found no basis of fact on the record to support the pleas. At the plea hearing, the Court asked the defendant questions regarding his age and occupation, and read the indictment to the defendant. The Court did not comply with the other requirements of Rule 11. The Cody Court emphasized that "the ominous consequences of self-conviction resulting from a guilty plea

must still be guarded by thorough judicial inquiry as required by Rule 11." 438 F.2d at 289.

For other decisions reversing convictions due to defective guilty pleas, See United States v. Fels, 599 F.2d 142 (7th Cir. 1979); Majko v. United States, 457 F.2d 790 (7th Cir. 1972) and United States v. Cammisano, 599 F.2d 851 (8th Cir. 1979).

This case arises out of an extraordinarily complex bankruptcy proceeding, one of the largest in the history of North Dakota. The Petitioner's alleged mismanagement of the estate has lead to his own resignation, the resignation of the supervising bankruptcy judge, In the Matter of the Investigation of the Administration of the Bankruptcy Court, Bankruptcy Judge Gordon Thompson, 633 F.2d 519 (8th Cir. 1980); In the Matter of the Investigation of the Bankruptcy

Court, 607 F.2d 797 (8th Cir. 1979); In the Matter of the Investigation of the Bankruptcy Court, 610 F.2d 547 (8th Cir. 1979), a controversy over the amount of fees the Petitioner earned from the bankrupt estates, In Re ENDECO, Inc. v. Herzog, slip op. 80-1406 (8th Cir. November 26, 1980) and litigation over the Petitioner's alleged embezllement from the bankrupt estate, McMerty v. Herzog, No. 81-1071, yet to be decided by the Eighth Circuit Court of Appeals.

Yet despite the extraordinary nature of this case, the trial court accepted the guilty pleas based upon Petitioner's yes and no responses to the litany required by Rule 11. After the plea, but before the sentencing, Petitioner submitted to the Court a detailed refutation of each count of the indictment. The documents presented reflected Petitioner's

handling of the complex ENDECO bankruptcy, and repeatedly emphasized his belief that he performed his duties conscientiously and honestly; and that he acted with the advice and assistance of counsel.

The decisions of the circuit courts, cited above, are in conflict with the Eighth Circuit decision here. Just as in Wetterlin, supra, where the Seventh Circuit found a relation between the charge of conspiracy and the facts supporting the charge to be lacking, here, the facts presented at the plea hearing did show the complexity of the case, but Petitioner's subsequent refutation of the facts negates any evidence of his intent to commit the crimes charged. Petitioner's denial of guilt is analogous to what happened in Burton supra, where the defendant plead guilty, while at the

same time, claiming he was innocent. His convictions were reversed. A claim of innocence is a ground for permitting withdrawal of a guilty plea, either because it negatives the voluntariness of the plea or it demonstrates manifest injustice. See Woodward v. United States, 426 F.2d 959, 964 (3rd Cir. 1970); United States v. Roberts, 570 F.2d 999, 1009, (2nd Cir. 1977).

The Petitioner was incarcerated. He faced the "ominous consequences of self-conviction resulting from a guilty plea." Cody, supra, 438 F.2d at 289.

The mandate of McCarthy, that there be an adequate factual basis for the guilty plea, was ignored in this case. The facts surrounding the plea indicated only the enormous complexity of the bankrupt estate. The Petitioner's protestation of innocence negatives any

evidence presented to show he intended to commit the crimes charged against him.

Petitioner must be allowed to plead anew, and present his case before the jury of his peers.

CONCLUSION

Based upon the foregoing, it is respectfully submitted that the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 80-1578

United States of America,	*	
	*	Appeal from
Appellee,	*	the United
	*	States District
v.	*	Court for the
	*	District of
James H. Herzog,	*	North Dakota.
	*	
Appellant.	*	

Submitted: November 12, 1980
Filed: March 20, 1981

Before LAY, Chief Judge, BENNETT,* Court of Claims Judge, and HENLEY, Circuit Judge.

HENLEY, Circuit Judge.

Appellant, James Herzog, appeals from

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*Marion T. Bennett, Judge, United States Court of Claims, setting by designation.

an order of the district court[1] denying motions he made, pursuant to Rule 32(d), Fed. R. Crim. P., and 28 U.S.C. § 2255, requesting leave to withdraw pleas of guilty and nolo contendere, or alternatively, requesting vacation of the judgments entered on those pleas. We affirm the order of the district court and deny appellant's requested relief.

In November, 1978, appellant, formerly a trustee in bankruptcy, was indicted and charged in separate counts with fourteen violations of 18 U.S.C. § 153, which prohibits embezzlement by a trustee or officer. Appellant's trial was set for March, 1979, approximately four months from the time the indictment

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[1] United States District Court for the District of North Dakota, The Honorable Paul Benson, Chief Judge, presiding.

was returned. During this four-month period appellant and the government engaged in plea negotiations and a plea agreement was reached.

The agreement provided that the government would dismiss Count 4 and Counts 6 - 14 of the indictment in return for appellant's pleading nolo contendere to Count 1 and pleading guilty to Counts 2, 3, and 5. In addition, appellant agreed to plead guilty to an information charging him with violating 28 U.S.C. § 154, which prohibits self-dealing by a trustee.

On March 12, 1979, the scheduled trial date, the parties appeared before the district court and disclosed their plea agreement. The district court accepted appellant's pleas and entered an order dismissing Counts 7 - 14 of the indictment. On April 12, 1979,

judgment was entered on appellant's pleas, appellant was sentenced, and Counts 4 and 6 of the indictment were dismissed.

In May, 1980, more than one year after his sentencing, appellant filed a Rule 32(d) motion, requesting leave to withdraw his pleas, and a section 2255 motion, requesting the court to vacate the judgments entered on his pleas. In support of these motions, appellant alleged in the district court and urges here (1) that the requirements of Rule 11, Fed. R. Crim. P., were not satisfied in that no adequate factual basis of guilt including criminal intent was shown and (2) that Counts 2, 3 and 5 of the indictment were multiplicious and his convictions on them violated the fifth amendment's double jeopardy clause.

After hearing, the district court entered an order denying appellant's requested relief. It is from this order that appellant appeals.

A defendant is entitled to withdraw a guilty plea or nolo contendere plea if the trial court, in accepting the plea, failed to comply substantially with Rule 11, Fed. R. Crim. P. See United States v. Cammisano, 559 F.2d 851, 855 (8th Cir. 1979). Subsection (f) of Rule 11 provides that

> the court should not enter a judgment upon [a guilty] plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.

To establish a factual basis,

> [a]n inquiry might be made of the defendant, of the attorneys for the government and the defense, of the presentence report when one is available, or by whatever means is appropriate in a specific case.

Fed. R. Crim. P. 11 Notes of Advisory Committee on Rules (1974 Amendment). "One example in the latter omnibus category would be the taking of testimony or consideration of documentary evidence." 8 J. Moore, Moore's Federal Practice ¶11.03[3], at 1173 (2d ed. 1978) (footnote omitted).

Appellant contends that the ritual followed by the trial court failed to comport with the requirements of Rule 11(f). In establishing this, appellant bears the burden of proof. United States v. Becklean, 598 F.2d 1122, 1125 (8th Cir.), cert. denied, 444 U.S. 864 (1979). We agree with the district court's finding that appellant failed to carry this burden.

This is not a case where a plea was accepted after a limited inquiry

of the defendant and upon the unsubstantiated assertions of an indictment. Compare United States v. Cody, 438 F.2d 287, 288-89 (8th Cir. 1971). Here, the trial court, prior to entering judgment on the pleas, heard testimony of three government witnesses, examined voluminous documentary evidence presented by both the government and appellant, examined the presentence report, and inquired of the appellant personally concerning the nature of the charges and the conduct in which he was alleged to have engaged. Appellant acknowledged his guilt and, when expressly asked by the court, agreed with the evidence presented by the government. This conduct, considered in light of appellant's age, experience and education, provided a sufficient basis upon which to accept

his pleas. See United States v. Brown, 593 F.2d 351, 352 n.2 (8th Cir. 1979); Benson v. United States, 552 F.2d 223, 225 (8th Cir.), cert. denied, 434 U.S. 851 (1977).

The trial court's procedures comported with the demands of Rule 11(f). It explored all reasonably available fact sources, as well as material presented to it concerning appellant's criminal intent. Sufficient evidence was presented to support the conclusion that appellant was guilty beyond a reasonable doubt. See Jackson v. Virginia, 443 U.S. 307, 321 (1979).

As indicated, appellant also contends that the counts of the indictment to which he entered pleas were multiplicious and, therefore, violative of his right not to be put more than once in jeopardy.

More specifically, he notes that Count 1 charges misappropriation of monies in excess of $300,000.00 between September, 1973 and June, 1978, and that each of Counts 2, 3 and 5 charges misappropriation of smaller amounts of money on different dates, each within the time period found in Count 1.

The district court found appellant's multiplicity challenge meritless. It stated that "Although it is not evident from the face of the indictment, the evidence received at the change of plea hearing established that each count of the indictment referred to a separate occurrence that would have required separate evidence to prove at trial." An examination of the record on appeal reveals this to be the case, and we cannot say the district court's finding

on this issue is clearly erroneous. See Kistner v. United States, 332 F.2d 978, 980 (8th Cir. 1964); Harris v. United States, 237 F.2d 274, 276 (8th Cir. 1956).

The district court also rejected appellant's multiplicity challenge on grounds that it was precluded by his failure to raise the contention before entry of his pleas of guilty and nolo contendere. Cases from our circuit hold generally that a guilty plea waives all nonjurisdictional defects, e.g., Camp v. United States, 587 F.2d 387, 399 (8th Cir. 1978); United States v. Briscoe, 428 F.2d 954, 956 (8th Cir.), cert. denied, 400 U.S. 966 (1970), and that double jeopardy is a personal defense and not jurisdictional, e.g., McClain v. Brown, 587 F.2d 389, 391

(8th Cir. 1964). Moreover, we have observed that defects in the indictment or questions of double jeopardy usually cannot, after conviction, be raised under section 2255. Houser v. United States, 508 F.2d 509, 514-15 (8th Cir. 1974).[2]

Rule 12(b)(2), Fed. R. Crim. P., requires that a complaint about the multiplicity of an indictment, and its inherent double jeopardy problems, be raised before trial. In the present circumstances, appellant's failure to

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[2] A guilty plea alone may not always waive a claim of double jeopardy. See Menna v. New York, 423 U.S. 61, 62 (1975). Menna notes, however, that a counseled guilty plea validly removes the issue of factual guilt from the case and renders irrelevant constitutional violations not logically inconsistent with factual guilt and that a double jeopardy complaint may be waived. Id. at n.2

do so acted as a waiver of that complaint. United States v. Sheehy, 541 F.2d 123, 130 & n.20 (1st Cir. 1976); United States v. Conley, 503 F.2d 520, 521 (8th Cir. 1974).

Appellant raised his multiplicity complaint for the first time more than one year after entering his pleas. He raised this complaint by direct attack via Rule 32(d) and collateral attack via section 2255. Appellant had ample time prior to entering his pleas in which to scrutinize closely the charges in the indictment and determine if they were subject to objection. He chose not to challenge the indictment, but rather to negotiate for the dismissal of numerous counts in return for his pleas. Appellant's reasons for initially pleading guilty and nolo contendere to

four counts of the indictment are as valid now as they were at the time the pleas were entered. The indictment to which appellant pleaded has not changed with the passage of time.

To permit appellant to now raise his double jeopardy complaint would thwart the orderly and efficient administration of our criminal justice system, as well as make hollow the constraints imposed by Rule 12(b)(2).

> [A] claim once waived pursuant to [Rule 12(b)(2)] may not later be resurrected, either in the criminal proceedings or in federal habeas, in the absence of the showing of "cause" which [Rule 12(f)] requires.

Davis v. United States, 411 U.S. 233, 242 (1973). Appellant failed to raise his complaint timely, and made insufficient showing of cause in the

district court.

We conclude that the judgment of the district court should be, and it is, affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS
EIGHTH CIRCUIT.

UNPUBLISHED DECISION OF THE
DISTRICT COURT

Defendant in the above entitled criminal case has moved pursuant to F.R.Crim.P. 32(d) to withdraw his pleas of nolo contendere and guilty, and in the alternative for an order pursuant to 28 U.S.C. §2255 vacating the sentences imposed.

Defendant was charged in a fourteen count indictment with violating 28 U.S.C. §153, which provides as follows:

"Whoever knowingly and fraudulently appropriates to his own use, embezzles, spends, or transfers any property or secretes or destroys any document belonging to the estate of a bankrupt which came into his charge as trustee, receiver, custodian, marshal, or other officer of the court, shall be fined not more

than $5,000 or imprisoned not more than five years, or both."

Defendant plead nolo contendere to Count One of the indictment, and guilty to Counts Two, Three and Five. Defendant also pleaded guilty to an information filed on the day he changed his plea, which charged a violation of 18 U.S.C. §154. Counts Four and Six through Fourteen of the indictment were dismissed on motion of the United States. Defendant was sentenced to be committed to the custody of the Attorney General for five years on Counts Two, Three and Five, the sentences to run concurrently. Imposition of the sentence on Count One and on the offense charged in the information was suspended and defendant was placed on probation for a concurrent period of three years, to commence when defendant has been released from confinement.

Rule 32(d) provides that a motion to withdraw a plea of guilty or of nolo contendere may be made only before sentence is imposed or imposition of sentence is suspended. After sentence the court may set aside the judgment of conviction and permit the defendant to withdraw his plea only to correct manifest injustice.

The record establishes that the pleas of nolo contendere and guilty were entered knowingly and voluntarily by defendant after the court informed defendant fully of the consequences of his change of plea.

Defendant contends that there was no factual basis for the pleas. This contention is without merit. Detailed testimony of F.B.I. agents who had investigated defendant's

activities as trustee was received into evidence at the change of plea hearing. The uncontroverted testimony of those agents was evidence that defendant had committed the offenses charged in Counts One, Two, Three and Five of the indictment and in the information. After the completion of the testimony of the F.B.I. agents, defendant was convicted on his nolo contendere plea to Count One and on his guilty pleas together with his admission that he had appropriated to his own use monies belonging to the estate of the bankrupt corporation which came into his charge as trustee of those estates as charged in Counts Two, Three and Five of the indictment. Defendant was convicted on the charge in the information on his guilty plea and his admission that he

knowingly purchased property belonging to the bankrupt estates for which he was trustee as charged.

Defendant contends, for the first time, that Counts Two, Three and Five of the indictment are multiplicitious and that the judgment of conviction entered on those counts violates the Double Jeopardy Clause. This contention is also without merit. Although it is not evident from the face of the indictment, the evidence received at the change of plea hearing established that each count of the indictment referred to a separate occurrence that would have required separate evidence to prove at trial.

Defendant having failed to show manifest injustice, the motion to withdraw the pleas of nolo contendere and guilty with be denied.

The alternative motion to vacate sentence pursuant to 28 U.S.C. §2255 will also be denied. As stated supra, defendant pled guilty and nolo contendere knowingly and voluntarily and a factual basis exists which establishes the elements of the crime to which he entered his pleas. The double jeopardy argument may not be raised in a collateral proceeding, for multiplicity is a defense or objection that could have and, pursuant to Rule 12(b)(2), should have been raised before the change of plea. Houser v. United States, 508 F.2d 509, 515 (8th cir. 1974). The court further notes that a plea of guilty waives all nonjurisdictional defects in the proceedings. Id. at 516.

The court finds that defendant's motion and the files and records of the case conclusively show that the

defendant is entitled to no relief under 28 U.S.C. §2255.

IT IS ORDERED that defendant's motion to withdraw the pleas of guilty and nolo contendere is DENIED.

IT IS FURTHER ORDERED that defendant's alternative motion to vacate the sentence imposed is DENIED.

Dated this 19th day of June, 1980.

/s/ Paul Benson
PAUL BENSON, CHIEF JUDGE
UNITED STATES DISTRICT COURT